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No. 99-1178

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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

—v.—

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE, PEOPLE FOR THE AMERICAN WAY FOUNDATION,* IN SUPPORT OF RESPONDENTS

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NATIONAL GAY AND LESBIAN TASK FORCE, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE, HUMAN RIGHTS CAMPAIGN, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, NATIONAL FEDERATION OF FILIPINO AMERICAN ASSOCIATIONS, INDIA ABROAD CENTER FOR POLITICAL AWARENESS, NATIONAL URBAN LEAGUE, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL WOMEN'S LAW CENTER, AND AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

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INTEREST OF *AMICI*

The Anti-Defamation League, People for the American Way Foundation, National Gay and Lesbian Task Force, NOW Legal Defense and Education Fund, National Conference for Community and Justice, Human Rights Campaign, National Coalition Against Domestic Violence, National Federation of Filipino American Associations, India Abroad Center for Political Awareness, National Urban League, National Council of Jewish Women, National Women's Law Center, and American Association of University Women submit this brief as *amici curiae* in support of respondents.[1]

Anti-Defamation League

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws, and has consistently made its voice heard in the courts as an advocacy organization fighting to guarantee equal treatment of all persons. In particular, ADL has filed *amicus* briefs in

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amici* have obtained and lodge herewith the written consents of the parties to the submission of this brief. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person, other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, or defending government enactments designed to prevent or punish discrimination and hate. These include many of the Court's landmark cases in the area of civil rights and equal protection, as well as several cases addressing Commerce Clause issues in connection with civil rights enactments.[2]

People for the American Way Foundation

People For is a non-partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in supporting the enactment of civil rights legislation, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias and discrimination. People For has frequently submitted *amicus* briefs in this Court in support of civil rights legislation and of court decisions invalidating discriminatory laws and practices.

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Miller v. Johnson*, 515 U.S. 900 (1995); *Romer v. Evans*, 517 U.S. 620 (1995); *United States v. Morrison*, 120 S.Ct.. 1740 (2000); and *Univ. of Alabama v. Garrrett*, No. 99-1240 (pending) (2000).

National Gay and Lesbian Task Force

Founded in 1973, the National Gay and Lesbian Task Force ("NGLTF") works to eliminate prejudice, violence, and injustice against gay, lesbian, bisexual, and transgendered people, at the local, state, and national levels. As part of a broader social justice movement for freedom, justice, and equality, NGLTF seeks to create a world that respects and celebrates the diversity of human expression and identify where all people may fully participate in society.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for thirty years. NOW Legal Defense engages on many fronts to eliminate gender-motivated violence and to ensure uniform enforcement of civil rights nationwide. NOW Legal Defense chairs the national task force that was instrumental in passing the historic 1994 Violence Against Women Act ("VAWA"), and represented Christy Brzonkala in *United States v. Morrison*, 120 S. Ct. 1740 (2000). In addition, NOW Legal Defense has appeared in numerous other cases seeking to enforce federal civil rights laws[3], and supporting the rights of women who

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[3] *See, e.g., Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Univ. of Alabama v. Garrett*, No. 99-1240 (pending) (2000).

have been the victims of domestic and other gender-motivated violence.[4]

National Conference for Community and Justice

Founded in 1927 as the National Conference for Christians and Jews, the National Conference for Community and Justice ("NCCJ") is a human relations organization dedicated to fighting bias, bigotry, and racism in America. NCCJ promotes understanding and respect among all races, religions, and cultures through advocacy, conflict resolution, and education. It is uniquely positioned to enhance community leadership development programs in its service area with 65 offices in 35 states and the District of Columbia, and has dedicated itself to transforming communities to provide fuller opportunity and to be inclusive and just through institutional change and by empowering leaders.

Human Rights Campaign

The Human Rights Campaign ("HRC") is the nation's largest gay and lesbian civil rights organization, with over 360,000 members nationwide. HRC is devoted to fighting and ending discrimination on the basis of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC has provided federal and state legislative, regulatory, and judicial advocacy, media, and grass roots support on a range of initiatives affecting gay, lesbian and bisexual individuals who suffer discrimination on the basis of their sexual orientation, including the Employment Non-Discrimination Act.

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[4] *United States v. Lanier*, 520 U.S. 259 (1997).

National Coalition Against Domestic Violence

Founded in 1978, the National Coalition Against Domestic Violence ("NCADV") is a grassroots organization representing a national network of over 2,000 local programs and state coalitions that serve battered women and their children. NCADV serves as a national information and referral center for the general public, the media, battered women and their children, public and private agencies, and organizations. NCADV maintains a public policy office in Washington, D.C. in order to influence federal legislation that relates to violence against women, including domestic violence, sexual assault, and stalking. NCADV provides information and technical assistance, and promotes the development of innovative model programs which address the special needs of battered women and battered women's programs. NCADV is especially committed to ending misconceptions about violence against women and victim blaming as well as promoting public awareness about the nature of crimes against women.

National Federation of Filipino American Associations

The National Federation of Filipino American Associations ("NaFFAA") was formed in 1997 to promote the interests of Filipinos and Filipino Americans so that they can become active participants and leaders in all aspects of U.S. society. It is NaFFAA's mission to promote community empowerment through civic participation in the U.S. political process. Essential to this mission is advocacy for civil rights, equity, social justice, and equal treatment of all persons. NaFFAA has led the struggle of Filipino World War II Veterans who have been denied their benefits due in large part to institutional racism. NaFFAA has also collaborated with

other national civil rights organizations to fight hate crimes, racial profiling, and anti-Asian violence. NaFFAA is proud to be part of a broader social justice movement for freedom, justice, and equality, and believes deeply that diversity is the foundation of America's strength.

India Abroad Center for Political Awareness

The India Abroad Center for Political Awareness ("IACPA") was founded in 1994 to help increase political awareness in the Asian Indian American community. IACPA is a national, nonpartisan, nonprofit agency dedicated to fighting for hate crimes legislation, for fair treatment for immigrant communities, and for increased participation by Indian Americans in our democracy.

National Urban League

The National Urban League, under the leadership of Hugh B. Price, has sought to emphasize greater reliance on the unique resources and strengths of the African-American community to find solutions to its own problems. The League's approach has been to utilize the tools of advocacy, research, program service, and systems change. The result has been an organization with strong community roots focused on the social and educational development of youth, economic self-sufficiency, and racial inclusion. The League, through its affiliate system, serves more than 2 million individuals each year. The League views with concern any potential abridgement of the scope of the federal Commerce Clause.

National Council of Jewish Women

The National Council of Jewish Women ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve quality of life for women, children, and families, and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 90,000 members in over 500 communities nationwide. NCJW joins this brief in view of its historical commitment to civil rights and its active involvement in passage of our nation's civil rights laws.

National Women's Law Center

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in education, the workplace, and other settings, including through litigation of cases brought under federal anti-discrimination laws. NWLC has a deep and abiding interest in ensuring that these laws are fully implemented and enforced.

American Association Of University Women

For over a century, the American Association of University Women ("AAUW"), an organization of 150,000 members, has been a catalyst for the advancement of women and their transformation of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal

change. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues, including: gender equity in education; reproductive choice; social security; and workplace and civil rights issues. AAUW supports constitutional protection and enforcement of civil rights for all individuals, and opposes all forms of discrimination.

* * *

As leading civil rights organizations, the *amici* have a keen interest in the use by Congress of the Commerce Clause power to enact and enforce civil and human rights protections. *Amici* have consistently supported *federal* jurisdiction over activities, whether they may be characterized primarily as commercial or non-commercial, that are inimical to the fundamental human rights of our people. From the seminal Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, to VAWA (108 Stat. §§ 1902-1942), to the pending federal hate crimes legislation [Local Law Enforcement Enhancement Act of 2000], *amici* have supported national efforts precisely because local efforts have been absent or ineffective, or because a concerted national effort was plainly required to eradicate long-tolerated practices that had persisted over decades despite their illegality.

The case before the Court today does not directly concern a civil rights law. But its resolution — should the Court abandon the "cumulative impact" or "aggregation" principle that historically has been used to evaluate exercises of the Commerce Clause power — may cast serious doubt on the previously well-accepted foundations of some of the central civil rights laws of our time. *Amici* therefore appear in this case to demonstrate that the aggregation principle is a well-founded rule whose application is of great utility in determining

whether Congress has acted consistently with the powers conferred on it by the Constitution — as it has here indisputably done. *Amici* also appear to point out that the civil rights protections supported by the aggregation principle not only are part of our settled expectations as a society, but also have been prime movers in the evolution of the freest nation in the world, whose fundamental social liberties have been in part responsible for its emergence as a dominant world power. The articulation and maintenance of the enumerated powers of Congress, as well as the balance between local and central power, have been well served by the constitutional regime that the Court reexamines in this case. In disregarding that regime, the Court would act at the peril of settled expectations as to our nation's civil and human rights.

STATEMENT

1. This case concerns the failure by petitioner to secure a landfill or balefill permit from the U.S. Army Corps of Engineers in order to comply with the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The Corps claims jurisdiction to require petitioner to secure such a fill permit in order to fill over 17 acres of lakes and ponds that are neither interstate in character nor have a connection to interstate or navigable waters. In so insisting, the Corps relies on the "migratory bird" rule. The rule permits it to exercise jurisdiction over such waters because of their actual or potential use as habitat for migratory birds, and the resulting substantial effects on interstate commerce that destruction of migratory bird habitat might have.

2. The parties concede, and the Seventh Circuit found, "that the waters of [the landfill] site were a habitat for migratory birds." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999). The circuit court further found that "the destruction of migratory bird habitat and the attendant decrease in the population of these birds 'substantially' affects interstate commerce." *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850. The activities of observing, hunting, and trapping migratory birds are a not insubstantial component of the national economy, entailing the expenditure of billions of dollars each year, and travel across state lines.

3. While mindful that the Corps of Engineers' actions prohibiting the filling of ponds that serve as migratory bird habitat could be seen as a purely local regulation, the circuit court was equally clear that proper implementation of the Commerce Clause power requires Congress to consider the "aggregate effect" of individual or local actions in order to assess whether, overall, such actions have a "substantial effect" on interstate commerce. "The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires." *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850.

4. The Court granted *certiorari* to consider two questions. First, whether the Corps of Engineers, consistent with the language and intent of the Clean Water Act, may assert jurisdiction over isolated intrastate waters because they serve as habitat of migratory birds. Second, whether the exercise of such jurisdiction is within the power conferred on Congress by the Commerce Clause. Put differently, the question is whether, by reason of the conceded aggregate substantial effect on the national economy of the destruction of

migratory bird habitat, our central government may invoke its commerce power.[5]

SUMMARY OF ARGUMENT

1. The exercise of federal power at issue here is in all respects consistent with the Commerce Clause and with this Court's settled Commerce Clause jurisprudence. National power extends to activities that, although local in nature, may in the aggregate have a substantial impact on the nation's and our people's economic life. The aggregation principle is a well settled precept that elucidates the circumstances in which the exercise of national legislative power is warranted.

2. The boundaries of the commerce power have been developed and articulated by this Court over almost two centuries of case law and social and economic development. The exercise of that power here must be analyzed within the context of the pragmatic test first articulated by *Gibbons v. Ogden*, and elaborated in the cases that have enunciated the substantial effects test and the aggregation principle in the modern era. When viewed within that setting, this exercise of federal power — as well as that exercise which underlies adoption of numerous civil rights protections — is undoubtedly consistent with the commerce clause.

3. The aggregation principle has served as the cornerstone of the federal power underlying some of this

[5] *Amici* take no position on the first question, as they have no interest, other than a general, undifferentiated one, in the enforcement of our country's environmental laws. As to the second question, however, *amici* have a sharp and specific interest in the use of the cumulative impact or aggregation principle to sustain Congress's civil and human rights enactments.

nation's most important civil rights enactments. In the civil rights context, the cumulative effect or aggregation principle has in this Court's view provided the support for the Civil Rights Act of 1964, and for other laws that protect the access of protected groups to the national economic life, and as such are within the paradigm of federal power.

4. As a long-standing pillar of the commerce power, the aggregation principle is part of the settled expectations of our people and our nation. Likewise, the laws it supports are a part of those settled expectations. The rule of *stare decisis* is an important one. No departure from it is warranted in the circumstances of this case.

ARGUMENT

THE AGGREGATION PRINCIPLE IS A FUNDAMENTAL AND WELL-GROUNDED CONSTITUTIONAL DOCTRINE THAT SHOULD BE RETAINED BY THIS COURT

Drawing upon the touchstone of *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), the cumulative impact principle is essential to the judicial consideration of whether Congress may regulate the web of interstate dealings that constitute and permeate our national economy. The principle is based on the recognition that use of the commerce power reflects the economic interrelatedness of our people and our nation, as well as the federal government's special competence in dealing with problems of national scope. The requirements of federalism are important, as is the teaching that enumerated and divided powers are designed to protect and preserve our peoples' liberties. But when those precepts are used as talismans to undermine a federal power that properly protects our environment, our civil rights, or other areas of federal concern, we risk exalting concept over reality.

A. The Cumulative Impact Test is Firmly Rooted in Our Nation's Economic Life and Well Settled in its Constitutional History.

Article I, § 8 of the United States Constitution gives Congress the authority to "regulate Commerce . . . among the several States." U.S. Constitution Art. I, § 8. In *Gibbons*, Chief Justice Marshall enunciated the view that congressional power over "commercial intercourse" extended to all commercial activity having any interstate component, aspect, or impact, however indirect, and that

Congress's commerce power is "plenary," absolute within the sphere of legislation with respect to all "commerce which concerns more states than one." *Id.* at 194. Under this view, the sole constraint on the commerce power is the democratic process itself. "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, . . . the sole restraints . . . on its abuse." *Id.* at 197.

Notwithstanding the clear mandate of *Gibbons*, the Court retreated from this expansive view and during the period 1887 through 1937 sought to deny Congress the power to deal with uniquely national problems. The Court ignored "the single, national market still emergent in our own era." *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring). At the same time, the Court engaged in an artificial hermeneutics of the term "commerce" that sought to justify a narrow and confined reading of national power. *E.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (distinguishing between commerce and production). The retreat from Chief Justice Marshall's view culminated in a series of decisions that struck down Congress's efforts to deal with the worst economic depression this nation had ever suffered. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *See Lopez*, 514 U.S. at 571-72 (Kennedy, J., concurring).

Following the close of that now-outmoded jurisprudential era, however, the Court resoundingly rejected its former fragmented view of the Commerce Clause power, and reaffirmed the pragmatic rule first enunciated by Chief Justice Marshall in *Gibbons*. Thus, beginning with the landmark decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court began to develop a modern view of the commerce power,

in keeping with a truly national economy. The Court there held that Congress could regulate labor relations at an integrated manufacturing and interstate sales enterprise because labor unrest and work stoppages at such a business "would have a most serious effect upon interstate commerce." *Id.* at 41, 42.

Following *Jones & Laughlin*, the Court developed the pragmatic "substantial effects" test, which focused on the "effect" on interstate commerce of a regulated activity. At the same time, it rejected the ritualistic search for whether an activity was in the current of commerce. In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court approved federal regulation of wages and hours of workers because effectuation of the Commerce Clause power conferred on Congress the power to protect the national economy.

In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court further reaffirmed the plenary scope of Congress's power to regulate activities that substantially affect commerce by enunciating the "aggregation" or "cumulative effect" principle. *Id.* at 129. In that case, the Court held that Congress could regulate a farmer's production of wheat for home consumption, because the cumulative effect of such consumption might alter the supply-and-demand relationships of an interstate market. The Court approved the regulation of a specific intrastate activity that "may be trivial by itself," because the effect on interstate commerce of that activity, "taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28.

In both *Darby* and *Wickard*, the Court looked not only to the Commerce Clause but also to the Necessary and Proper Clause, as it was explicated by the Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

The Necessary and Proper Clause augments the Commerce Clause, and gives Congress the broad prerogative to determine the means by which it will effectuate its policy regarding interstate commerce. *Id.* at 420-21.[6]

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Darby, 312 U.S. at 118. The Necessary and Proper Clause permits Congress to regulate in areas not strictly within the enumerated powers of Article I, Section 8 if necessary to carry out an enumerated power. Recognizing the nature and extent of the Necessary and Proper Clause "made the mechanical application of legal formulas no longer feasible." *Wickard*, 317 U.S. at 124.

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[6] Because it is well settled that Congress has the power to protect what is in all senses a national economy, laws that protect entry into and full participation in that economy express the exercise of powers ancillary to an enumerated power. Such laws are "constitutionally valid, so long as the ancillary power neither conflicts with external limitations, such as those of the Bill of Rights and of federalism, nor renders Congress' powers limitless." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-3 at 798 (3d ed. 2000). The federal civil rights laws are consistent with a principled distinction between federal and state power, and do not signal unlimited federal power.

The Court's most recent cases examining Congress's power under the Commerce Clause confirm that Congress may regulate local activities, when necessary to protect the national economy, because of their effects beyond state borders.[7] *See United States v. Morrison*, 120 S.Ct. 1740 (2000) (finding no interstate effect of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (finding no sufficient interstate commerce effect from firearms possession near schools). As stated in *Morrison*, the Court will sustain "a wide variety of congressional Acts regulating intrastate economic activity where [the Court] conclude[s] that the activity substantially affect[s] interstate commerce." *Morrison*, 120 S.Ct. at 1750 (quoting *Lopez*).[8]

Using cumulative impact principle to determine substantial effect is a settled rule of constitutional

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[7] *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (enforcing Federal Arbitration Act in state court suit involving home purchase); *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264 (1981) (local erosion standards in surface mining); *Perez v. United States*, 402 U.S. 146 (1971) (local criminal activity); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (intrastate marketing of milk). The *amicus* briefs filed by the Center for Individual Rights and others simply omit the history of Commerce Clause jurisprudence between *Gibbons* and *Lopez*. That they do so is not surprising, because in light of this history it would be difficult to argue, as they do, that Congress seeks to "bootstrap" or "extend" the commerce power beyond "commercial" activities. To the contrary, as the last half-century of case law demonstrates, it is petitioner and its *amici* that seek to truncate congressional power as currently recognized in this Court's jurisprudence.

[8] *Wickard* retains its constitutional vitality today. Yet precisely because it demonstrates how far the commerce power may constitutionally reach, it also discloses the weakness in an analysis that does not take into account the aggregate effects of individual acts. Growing wheat for home use has *no* effect on interstate commerce, except in the aggregate.

adjudication that should not be rejected or weakened. The Court today would disregard this principle at the peril of upsetting an analytic structure that has served both the Court and the nation well in ascertaining the bounds of congressional power.

B. The Cumulative Impact Test Strongly Enforces the Important Federal Interest in Uniform Civil Rights Protections.

Among the laws that have become so interwoven in the fabric of our national life as to make that life inconceivable (or certainly undesirable) without them are the seminal civil rights laws of the 1960s. The cumulative impact or aggregation principle first enunciated by this Court in *Wickard* provides the constitutional cornerstone of those laws. In the first cases to consider the constitutionality of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, the Court upheld a prohibition on racial discrimination at, respectively, a local motel and a local restaurant. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). Despite the purely local nature of these businesses, the Court emphasized the aggregate effect that racial discrimination in such activities would have on interstate commerce. The Court pointed to potential inhibition of interstate sale of goods, obstructions to interstate travel, and obstacles to the establishment of new business enterprises, all plainly evils that Congress sought to address in enacting this legislation. *Katzenbach v. McClung*, 379 U.S. 294 (1964).[9]

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[9] That the aggregation principle is critical to the holding of the Court in *Heart of Atlanta* is made abundantly clear by Justice Black's concurrence. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 268-79 (Black, J., concurring).

In responding to the objection, lodged in *Heart of Atlanta*, that the "operation of the motel here is of a purely local character," the Court quoted from *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949): "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Heart of Atlanta*, 379 U.S. at 258. Reaffirming both the substantial effects test and the aggregation principle of *Wickard*, the Court looked to the aggregate impact that local activities might have on national commerce.[10]

In the civil rights arena, the "cumulative impact" or "aggregate effects" principle gives due and proper weight to the effect of discriminatory activities on the national economic life of this country and its peoples, even in such local, non-commercial activities as education, voting, and protection from violence. Discrimination in the classroom, the housing markets, and the work force objectively deters individuals from full participation in the national economy. Less obviously, the experience of being denied access to schools or of being the object of hate-based violence subjectively impedes people's ability to work, to employ others, to invest and to consume. The primary purpose of civil

[10] The Court in *Heart of Atlanta* was equally clear as to the propriety of use of the commerce power even though the conduct forbidden, exclusion of persons from accommodation on the ground of race, could not fairly be characterized as "commercial." Indeed, "discrimination" can be viewed as "commercial" activity only if one examines its *effects* — limiting participation in or wholly excluding the object of discrimination from the national commercial life. "Discrimination" in itself is the archetype of a purely private, local, non-commercial activity — bias or hate directed at another because he or she is different, and the consequent decision not to admit that other to activities or associations generally deemed desirable.

rights protections "is the vindication of human dignity and not mere economics," yet regardless of their purpose Congress has unquestionable authority under the Commerce Clause to enact them because they substantially affect interstate commerce. *Heart of Atlanta*, 379 U.S. at 291-93 (Goldberg, J., concurring).

As used by this Court in *Katzenbach v. McClung* and *Heart of Atlanta*, the cumulative impact principle appropriately secures entry into, and full participation in, the national economy for all Americans. Stated otherwise, the principle serves to protect the economic life of this country for all its citizens, and is thus undoubtedly within the plenary commerce power. In the last analysis, the aggregation precept is nothing more than a refinement of the bedrock principle that this Court reaffirmed once again in *Morrison* and *Lopez*: that Congress has the power to regulate intrastate economic activity when the activity substantially affects interstate commerce. *Morrison*, 120 S.Ct. at 1750.[11]

Amici are not unmindful that the commerce power is limited, and that Congress, however salutary its purpose, may not reach purely local activities with purely local effects. But if this country's recent civil rights laws were to be challenged on the theory, similar to that

[11] Of course, neither the Civil Rights Act of 1964 nor the holdings of *Heart of Atlanta* and *Katzenbach* are before the Court today, and the interstate component of the 1964 Act may protect it from future challenge. However, if the Court repudiates the aggregation principle, civil rights enactments may nonetheless be subject to the same attack as the environmental regulation here. Even to subject them to such constitutional doubt would do violence to settled expectations that are part of the fabric of our American lives. The suggestion that congressional power to enact such laws might be repudiated would send a message of cynicism about human rights at so fundamental a level as to be anathema to a society founded on the rule of law.

before the Court here, that they are designed to attack purely local conduct, the ultimate results of that local conduct must be taken into account. Local, individual acts of discrimination and violence operate to exclude targeted individuals and, ultimately, targeted groups from the national economic life. By forestalling their entry into certain jobs, thwarting their advancement in jobs held, preventing them from owning homes, refusing them capital to operate their own businesses, or denying them the educations employers demand, purely local, non-commercial acts of discrimination, hate, and violence permit the badges and incidents of second class citizenship to continue to exist. The exclusion of classes of our citizenry from such economic participation cannot be seen as anything other than substantial in terms of its effect on the national economy. Preventing this evil is squarely within the paradigm of appropriate federal power.

C. The Case Before the Court Demonstrates Appropriate Circumstances in Which to Apply the Aggregation Principle.

A practical examination of ultimate effects also underscores the conclusion that the Seventh Circuit was correct in this case. Gradual eradication of migratory bird habitat, although its effects may be virtually unobservable in a local, limited territory, ultimately inhibits people from expending monies and traveling across state lines to hunt, trap, and observe migratory species. The aggregate effect of the activity Congress seeks to regulate — the filling of wetlands — plainly would distort the national economy.

Just as decisions like *Carter Coal* attempted to distinguish between "commercial" and "non-commercial" activities, so here petitioner urges that the applicability

of the cumulative impact test should turn on whether the regulated activity is "economic." (Brief for Petitioner at 45) Yet, a rigid "categorical rule" (*see Morrison* at 1748) is neither constitutionally required nor logically defensible in order to aggregate the effects of non-economic activities when the impact of those activities is felt in interstate commerce. To exalt such a rule to a constitutional threshold would thus be error. We suggest instead a more flexible and pragmatic approach; there should be principles that move the debate beyond mere labels.[12] The courts may ask a series of questions to determine whether a given regulation falls within the spheres of legitimate exercise of the commerce power, as augmented by the Necessary and Proper Clause. Some are: Does the subject matter entail special federal competence? Does congressional action address an absence of effective local regulation and enforcement? Is the subject traditionally a matter of national concern? Does the activity regulated have inherent interstate effects?

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[12] It contributes nothing to the debate to parade before the Court a series of "horribles" demonstrating the ostensible danger of governmental tyranny. The "backyard puddle" scenario (depicted by petitioner as well as by the Washington Legal Foundation, the Cato Institute, and the Center for Individual Rights) is calculated to take the commerce power to a point of patent absurdity. There is no basis to believe that Congress intended — or that respondents attempted — to reach so far. One may likewise imagine our country in the absence of laws founded upon the cumulative impact test, including key environmental regulations and civil rights protections. Imagination, however, is not needed, for in the latter case, the Court need only look to the state of American jurisprudence and economic and social life in the late 1920s, when the Court held national child labor laws unconstitutional (*see Hammer v. Dagenhart*, 247 U.S. 251 (1918)), and in the late 1950s, when the National Guard was called out to protect a young child who wished to attend a better public school.

The federal government has developed special competence in a variety of areas in part because of the dual sovereign nature of our national and local governments, in part because the people, through their elected representatives, have reposed power in the national government over two hundred and more years, and in part because Congress has dedicated resources at the federal level to problems of national scope. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). An absence of effective local regulation and enforcement leaves the power to enact such regulations in the hands of Congress under the Commerce Clause. *See, e.g., North American Co. v. SEC*, 327 U.S. 686, 704 (1946) ("The constitutionality of [the statute] thus becomes apparent" when viewed in light of the congressional objective "to rejuvenate local utility management, and to restore effective state regulation, both of which had been seriously impaired.") Similarly, a congressional finding that there is no tradition of effective local regulation is owed judicial deference and justifies Congress in acting to remedy national problems.

Certain areas are a traditional subject of national concern, and in those areas Congress self-evidently retains power to regulate. (As a corollary to this factor, the Court may consider whether congressional exercise of the commerce power will *not* interfere with areas of traditional *state* concern. *See Jones v. United States*, 120 S.Ct. 1904 (2000); *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).)

Similarly, certain activities, regardless of whether they may be said to have a "substantial effect" on national commerce, nonetheless have an inherent interstate effect. The filling of wetlands, even isolated, intrastate ones, has an inherent interstate effect. It reduces the habitat available to migratory wildlife, whose

lives have no reference to state geographic boundaries. In this connection, the Court traditionally, and properly, has shown great deference to legislative findings of impact on interstate commerce. *See Hodel*, 452 U.S. at 276; *Katzenbach, 379 U.S. at 303-4; Heart of Atlanta*, 379 U.S. at 258.

Civil rights protection traditionally is the special province of the federal government, as shown by the history of civil rights enforcement in this country. The underlying policy is embodied in the Fourteenth Amendment, which represents a reaffirmation of the federal, constitutional right of equality and fair treatment. Congress enacted the first Civil Rights Act in 1866, explicitly in response to the states' failure to shield individuals adequately from discrimination. Nearly a century later, Congress again found that the states were failing to enforce the civil rights of racial and other minorities, and enacted the Civil Rights Act of 1964. Such efforts, especially following the 1964 Act, have not been wholly to the exclusion of state and local regulation, yet nevertheless the history of civil rights enactment and enforcement demonstrates that the area has been traditionally entrusted to the national government.

Civil rights is also a matter of special national concern. The commerce power necessarily entails the power to protect every individual from local acts of violence and discrimination that prevent that individual from entering and fully participating in a national economy.

D. Rejecting the Cumulative Impact Doctrine and the Laws It Supports Would Undermine the Settled Expectations of the People of our Nation.

The Court's decisions in *Lopez* and *Morrison* are plainly based on the interpretation of the Commerce Clause in *Wickard* and the seminal civil rights cases discussed above. These cases in turn are based on the aggregation principle. Thus, throughout the 60 years that it has been employed by the Court, the laws that the aggregation principle buttresses have shaped the nation's social evolution. As a result, Americans have come to expect and believe that their national government shields them from hate, bias, and prejudice, whatever its source. To say now that the allocation of power that supports this source of security is jurisdictional error would topple the structure of modern American federalism. Respect for precedent and for the settled expectations of the American people caution against so radical a reversal.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), the Court specified four circumstances in which it might be appropriate to upset such a settled line of precedent. None applies here. The first is the "rare" case where a "prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed." *Casey*, 505 U.S. at 854. Neither constitutional scholars nor the Justices of this Court are unanimous in their evaluation of the cumulative impact doctrine. That there are right-thinking lawyers, judges, and scholars who regard the rule as well-founded belies any contention that it is plainly erroneous. A rule of constitutional adjudication that has endured for the last half-century cannot be said to have been "doomed" from adoption.

The second circumstance is where "the rule has proven to be intolerable simply in defying practical workability." *Id.* The cumulative impact test has yielded workable results for many years. It requires a calculus no more complex than any the Court employs in resolving other competing claims. As reinforced by the flexible and pragmatic analysis discussed above, the cumulative impact test furnishes a practical framework for articulating the limits on Congress's commerce power.

The third circumstance is where "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Id.* at 855. The result petitioner and its *amici* seek here is not to replace one outmoded rule with another more vital one, but to eliminate a key avenue through which Congress may properly exercise the commerce power. No new doctrine has emerged since *Wickard*. Indeed, recent decisions indicate that the cumulative impact doctrine retains its vitality — it is far from having been "abandoned." *See, e.g., Allied-Bruce Terminix*, 513 U.S. 265.

The fourth circumstance is where "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* The integrated national economy that prompted the adoption of the aggregation principle has only broadened and deepened. Now, no less than in the time of *Wickard*, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring). Clearly, and equally, civil rights protections are no less vital now and have no less economic effect than they were and had in the time of *Heart of Atlanta* and *Katzenbach*. The horrific events in Jasper, Texas

and Laramie, Wyoming, while they are egregious and certainly unrepresentative, serve to confirm this.

Casey also established the principle that the Court will give additional weight to a constitutional rule if it "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Casey*, 505 U.S. at 854. Overruling or further limiting the cumulative impact doctrine would generate a reexamination of the United States Code so profound and so far-reaching that it would occupy the better part of the *next* half-century. If the federal government's power to protect civil rights was called into question, millions of Americans would be left without recourse in the face of discrimination. No form of constitutional government could tolerate this type of dislocation.

* * *

As we have sought to make clear, *amici* are gravely concerned that the cramped and confined reading of the Commerce Clause power that petitioner and *its amici* urge here would be applied in future cases to endanger civil rights laws that have become a part of the settled expectations and fabric of our society. The federal civil rights laws were enacted against a background of decades of societal failure (principally, but not only, regionally and locally) to implement fundamental freedoms of the United States Constitution. In addition, Congress understood the economic impact of discrimination. It is no exaggeration to say that the guarantee of equality embodied in those laws, together with the enforcement mechanisms created by them and the federal commitment to support them, have been in part responsible for the United States' emergence as the world's dominant economic power. The ability of the

American people as a whole to protect the weakest among them preserves the very essence of our liberties. To strip our nation of that capability, and return to a long-discredited view both of the Constitution and the national government, would be the height of folly.

* * *

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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